

AMENDED IN ASSEMBLY MAY 4, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 1257

Introduced by Assembly ~~Member Umberg~~ Members *Umberg and Walters*
(Principal coauthor: Assembly Member Spitzer)
(Coauthor: Assembly Member Cohn)

February 22, 2005

An act to ~~add Section 311.12 to~~ amend Sections 311.2, 311.4, and 311.9 of the Penal Code, relating to crime.

LEGISLATIVE COUNSEL'S DIGEST

AB 1257, as amended, Umberg. Child exploitation.

Existing law provides that any person who ~~possesses obscene matter~~, possesses obscene matter depicting a person under 18 years of age personally engaging in or simulating sexual conduct, ~~duplicates matter that depicts a person under 18 years of age engaged in an act of sexual conduct~~, or who uses a minor to assist preparing obscene matter depicting a person under 18 years of age personally engaging in or simulating sexual conduct, ~~publishes, distributes, or promotes matter held out to be obscene~~, advertises obscene matter depicting a person under 18 years of age personally engaging in or simulating sexual conduct, or possesses matter depicting a person under 18 years of age personally engaging in or simulating sexual conduct is guilty of a crime is punishable, for a 1st offense, by a fine, imprisonment in a county jail, or by both fine and imprisonment.

This bill would ~~state legislative intent to eliminate misdemeanor or alternative misdemeanor or felony treatment of all child pornography or child exploitation offenses involving a person who is 14 years of age or younger~~. This bill would provide that any person who commits

a *1st* violation of these provisions ~~that involves a person who is 14 years of age or younger is also punishable by imprisonment in the state prison for 16 months, or 2 or 3 years unless a greater felony punishment is specified in that provision, in which case that punishment shall apply.~~

Because this bill would increase the prosecutorial duties of local officials, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 ~~SECTION 1. It is the intent of the Legislature in enacting this~~
2 ~~measure to eliminate misdemeanor or alternative misdemeanor or~~
3 ~~felony treatment of all child pornography or child exploitation~~
4 ~~offenses involving a person who is 14 years of age or younger~~
5 ~~and to mandate that these offenses are uniformly felonies~~
6 ~~punishable by imprisonment in the state prison.~~

7 ~~SEC. 2. Section 311.12 is added to the Penal Code, to read:~~

8 ~~311.12. Any person who commits a violation of subdivision~~
9 ~~(a) or (c) of Section 311.2, subdivision (a) of Section 311.3,~~
10 ~~subdivision (a) of Section 311.4, Section 311.5, subdivision (a)~~
11 ~~of Section 311.10, or subdivision (a) of Section 311.11, involving~~
12 ~~a person who is 14 years of age or younger is guilty of a felony~~
13 ~~and shall be punished either by imprisonment in the state prison~~
14 ~~for 16 months, or two or three years, or, if it is greater, by the~~
15 ~~applicable felony punishment specified in that section.~~

16 ~~SECTION 1. Section 311.2 of the Penal Code is amended to~~
17 ~~read:~~

18 ~~311.2. (a) Every person who knowingly sends or causes to be~~
19 ~~sent, or brings or causes to be brought, into this state for sale or~~
20 ~~distribution, or in this state possesses, prepares, publishes,~~
21 ~~produces, or prints, with intent to distribute or to exhibit to~~
22 ~~others, or who offers to distribute, distributes, or exhibits to~~

1 others, any obscene matter is for a first offense, guilty of a
2 misdemeanor. If the person has previously been convicted of any
3 violation of this section, the court may, in addition to the
4 punishment authorized in Section 311.9, impose a fine not
5 exceeding fifty thousand dollars (\$50,000).

6 (b) Every person who knowingly sends or causes to be sent, or
7 brings or causes to be brought, into this state for sale or
8 distribution, or in this state possesses, prepares, publishes,
9 produces, develops, duplicates, or prints any representation of
10 information, data, or image, including, but not limited to, any
11 film, filmstrip, photograph, negative, slide, photocopy, videotape,
12 video laser disc, computer hardware, computer software,
13 computer floppy disc, data storage media, CD-ROM, or
14 computer-generated equipment or any other computer-generated
15 image that contains or incorporates in any manner, any film or
16 filmstrip, with intent to distribute or to exhibit to, or to exchange
17 with, others for commercial consideration, or who offers to
18 distribute, distributes, or exhibits to, or exchanges with, others
19 for commercial consideration, any obscene matter, knowing that
20 the matter depicts a person under the age of 18 years personally
21 engaging in or personally simulating sexual conduct, as defined
22 in Section 311.4, is guilty of a felony and shall be punished by
23 imprisonment in the state prison for two, three, or six years, or by
24 a fine not exceeding one hundred thousand dollars (\$100,000), in
25 the absence of a finding that the defendant would be incapable of
26 paying such a fine, or by both that fine and imprisonment.

27 (c) Every person who knowingly sends or causes to be sent, or
28 brings or causes to be brought, into this state for sale or
29 distribution, or in this state possesses, prepares, publishes,
30 produces, develops, duplicates, or prints any representation of
31 information, data, or image, including, but not limited to, any
32 film, filmstrip, photograph, negative, slide, photocopy, videotape,
33 video laser disc, computer hardware, computer software,
34 computer floppy disc, data storage media, CD-ROM, or
35 computer-generated equipment or any other computer-generated
36 image that contains or incorporates in any manner, any film or
37 filmstrip, with intent to distribute or exhibit to, or to exchange
38 with, a person 18 years of age or older, or who offers to
39 distribute, distributes, or exhibits to, or exchanges with, a person
40 18 years of age or older any matter, knowing that the matter

1 depicts a person under the age of 18 years personally engaging in
2 or personally simulating sexual conduct, as defined in Section
3 311.4, ~~is guilty of a misdemeanor and~~ shall be punished by
4 imprisonment in the county jail for up to one year, or by a fine
5 not exceeding two thousand dollars (\$2,000), or by both that fine
6 and imprisonment, *or by imprisonment in the state prison*. It is
7 not necessary to prove commercial consideration or that the
8 matter is obscene in order to establish a violation of this
9 subdivision. If a person has been previously convicted of a
10 violation of this subdivision, he or she is guilty of a felony.

11 (d) Every person who knowingly sends or causes to be sent, or
12 brings or causes to be brought, into this state for sale or
13 distribution, or in this state possesses, prepares, publishes,
14 produces, develops, duplicates, or prints any representation of
15 information, data, or image, including, but not limited to, any
16 film, filmstrip, photograph, negative, slide, photocopy, videotape,
17 video laser disc, computer hardware, computer software,
18 computer floppy disc, data storage media, CD-ROM, or
19 computer-generated equipment or any other computer-generated
20 image that contains or incorporates in any manner, any film or
21 filmstrip, with intent to distribute or exhibit to, or to exchange
22 with, a person under 18 years of age, or who offers to distribute,
23 distributes, or exhibits to, or exchanges with, a person under 18
24 years of age any matter, knowing that the matter depicts a person
25 under the age of 18 years personally engaging in or personally
26 simulating sexual conduct, as defined in Section 311.4, is guilty
27 of a felony. It is not necessary to prove commercial consideration
28 or that the matter is obscene in order to establish a violation of
29 this subdivision.

30 (e) Subdivisions (a) to (d), inclusive, do not apply to the
31 activities of law enforcement and prosecuting agencies in the
32 investigation and prosecution of criminal offenses, to legitimate
33 medical, scientific, or educational activities, or to lawful conduct
34 between spouses.

35 (f) This section does not apply to matter that depicts a legally
36 emancipated child under the age of 18 years or to lawful conduct
37 between spouses when one or both are under the age of 18 years.

38 (g) It does not constitute a violation of this section for a
39 telephone corporation, as defined by Section 234 of the Public
40 Utilities Code, to carry or transmit messages described in this

1 chapter or to perform related activities in providing telephone
2 services.

3 *SEC. 2. Section 311.4 of the Penal Code is amended to read:*

4 311.4. (a) Every person who, with knowledge that a person is
5 a minor, or who, while in possession of any facts on the basis of
6 which he or she should reasonably know that the person is a
7 minor, hires, employs, or uses the minor to do or assist in doing
8 any of the acts described in Section 311.2, is, ~~for a first offense,~~
9 ~~guilty of a misdemeanor punishable as specified in Section 311.9.~~
10 If the person has previously been convicted of any violation of
11 this section, the court may, in addition to the punishment
12 authorized in Section 311.9, impose a fine not exceeding fifty
13 thousand dollars (\$50,000).

14 (b) Every person who, with knowledge that a person is a minor
15 under the age of 18 years, or who, while in possession of any
16 facts on the basis of which he or she should reasonably know that
17 the person is a minor under the age of 18 years, knowingly
18 promotes, employs, uses, persuades, induces, or coerces a minor
19 under the age of 18 years, or any parent or guardian of a minor
20 under the age of 18 years under his or her control who knowingly
21 permits the minor, to engage in or assist others to engage in
22 either posing or modeling alone or with others for purposes of
23 preparing any representation of information, data, or image,
24 including, but not limited to, any film, filmstrip, photograph,
25 negative, slide, photocopy, videotape, video laser disc, computer
26 hardware, computer software, computer floppy disc, data storage
27 media, CD-ROM, or computer-generated equipment or any other
28 computer-generated image that contains or incorporates in any
29 manner, any film, filmstrip, or a live performance involving,
30 sexual conduct by a minor under the age of 18 years alone or
31 with other persons or animals, for commercial purposes, is guilty
32 of a felony and shall be punished by imprisonment in the state
33 prison for three, six, or eight years.

34 (c) Every person who, with knowledge that a person is a minor
35 under the age of 18 years, or who, while in possession of any
36 facts on the basis of which he or she should reasonably know that
37 the person is a minor under the age of 18 years, knowingly
38 promotes, employs, uses, persuades, induces, or coerces a minor
39 under the age of 18 years, or any parent or guardian of a minor
40 under the age of 18 years under his or her control who knowingly

1 permits the minor, to engage in or assist others to engage in
2 either posing or modeling alone or with others for purposes of
3 preparing any representation of information, data, or image,
4 including, but not limited to, any film, filmstrip, photograph,
5 negative, slide, photocopy, videotape, video laser disc, computer
6 hardware, computer software, computer floppy disc, data storage
7 media, CD-ROM, or computer-generated equipment or any other
8 computer-generated image that contains or incorporates in any
9 manner, any film, filmstrip, or a live performance involving,
10 sexual conduct by a minor under the age of 18 years alone or
11 with other persons or animals, is guilty of a felony. It is not
12 necessary to prove commercial purposes in order to establish a
13 violation of this subdivision.

14 (d) (1) As used in subdivisions (b) and (c), “sexual conduct”
15 means any of the following, whether actual or simulated: sexual
16 intercourse, oral copulation, anal intercourse, anal oral
17 copulation, masturbation, bestiality, sexual sadism, sexual
18 masochism, penetration of the vagina or rectum by any object in
19 a lewd or lascivious manner, exhibition of the genitals or pubic
20 or rectal area for the purpose of sexual stimulation of the viewer,
21 any lewd or lascivious sexual act as defined in Section 288, or
22 excretory functions performed in a lewd or lascivious manner,
23 whether or not any of the above conduct is performed alone or
24 between members of the same or opposite sex or between
25 humans and animals. An act is simulated when it gives the
26 appearance of being sexual conduct.

27 (2) As used in subdivisions (b) and (c), “matter” means any
28 film, filmstrip, photograph, negative, slide, photocopy, videotape,
29 video laser disc, computer hardware, computer software,
30 computer floppy disc, or any other computer-related equipment
31 or computer-generated image that contains or incorporates in any
32 manner, any film, filmstrip, photograph, negative, slide,
33 photocopy, videotape, or video laser disc.

34 (e) This section does not apply to a legally emancipated minor
35 or to lawful conduct between spouses if one or both are under the
36 age of 18.

37 (f) In every prosecution under this section involving a minor
38 under the age of 14 years at the time of the offense, the age of the
39 victim shall be pled and proven for the purpose of the enhanced
40 penalty provided in Section 647.6. Failure to plead and prove that

1 the victim was under the age of 14 years at the time of the
2 offense is not a bar to prosecution under this section if it is
3 proven that the victim was under the age of 18 years at the time
4 of the offense.

5 *SEC. 3. Section 311.9 of the Penal Code is amended to read:*

6 311.9. (a) Every person who violates Section 311.2 or 311.5,
7 except subdivision (b) of Section 311.2, is punishable by fine of
8 not more than one thousand dollars (\$1,000) plus five dollars
9 (\$5) for each additional unit of material coming within the
10 provisions of this chapter, which is involved in the offense, not to
11 exceed ten thousand dollars (\$10,000), or by imprisonment in the
12 county jail for not more than six months plus one day for each
13 additional unit of material coming within the provisions of this
14 chapter, and which is involved in the offense, such basic
15 maximum and additional days not to exceed 360 days in the
16 county jail, or by both such fine and imprisonment. If ~~such~~ *the*
17 person has previously been convicted of any offense in this
18 chapter, or of a violation of Section 313.1, a violation of Section
19 311.2 or 311.5, except subdivision (b) of Section 311.2, is
20 punishable as a felony.

21 (b) Every person who violates Section 311.4 is punishable by
22 fine of not more than two thousand dollars (\$2,000) or by
23 imprisonment in the county jail for not more than one year, or by
24 both ~~such~~ *that* fine and ~~such~~ imprisonment, *or by imprisonment*
25 *in the state prison*. If ~~such~~ *the* person has been previously
26 convicted of a violation of former Section 311.3 or Section 311.4
27 he is punishable by imprisonment in the state prison.

28 (c) Every person who violates Section 311.7 is punishable by
29 fine of not more than one thousand dollars (\$1,000) or by
30 imprisonment in the county jail for not more than six months, or
31 by both such fine and imprisonment. For a second and
32 subsequent offense he shall be punished by a fine of not more
33 than two thousand dollars (\$2,000), or by imprisonment in the
34 county jail for not more than one year, or by both such fine and
35 imprisonment. If such person has been twice convicted of a
36 violation of this chapter, a violation of Section 311.7 is
37 punishable as a felony.

38 ~~SEC. 3.~~

39 *SEC. 4.* No reimbursement is required by this act pursuant to
40 Section 6 of Article XIII B of the California Constitution because

1 the only costs that may be incurred by a local agency or school
2 district will be incurred because this act creates a new crime or
3 infraction, eliminates a crime or infraction, or changes the
4 penalty for a crime or infraction, within the meaning of Section
5 17556 of the Government Code, or changes the definition of a
6 crime within the meaning of Section 6 of Article XIII B of the
7 California Constitution.

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